No. 14,523

United States Court of Appeals

For the Ninth Circuit

TRANS WORLD AIRLINES, INC.,
a corporation,
Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,
Appellees.

APPELLEES' PETITION FOR A REHEARING.

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APPELLEES' PETITION FOR A REHEARING.

To the Honorable Albert Lee Stephens, Wm. E. Orr and Walter L. Pope, Circuit Judges:

The above-named appellees hereby respectfully request a rehearing for the following reasons:

1. The Court's failure to rule on the question, that the operation of the City owned airport (especially the common use facilities thereof), is a public utility.

2. The Court's failure to find, that the City in the operation of a public utility (airport) cannot discriminate or give a preference between the various users of the common use facilities at the airport.

3. The Court's misinterpretation of the law, that in the operation of the airport, it is a State or Fed-

eral affair, rather than a "municipal affair" controlled and governed by the provisions of the Charter of the City and County of San Francisco, and subject to the rate making provisions of the Charter.

4. If the operation of the airport is not a municipal affair, it must be a Federal affair controlled by the Civil Aeronautics Act of 1938, as amended, then this Court is without jurisdiction.

5. If the operation of the airport is neither a municipal or Federal affair, it must be a State affair controlled by the Public Utilities Commission of the State of California then this Court is without jurisdiction.

I.

THE COURT'S FAILURE TO RULE ON THE QUESTION, THAT THE OPERATION OF THE AIRPORT, ESPECIALLY THE COMMON USE FACILITIES, IS A PUBLIC UTILITY BUSINESS.

Argument I in the City's* brief directly raised the question, "that the operation of common use facilities [at the airport] is a public utilities business".

The Court utterly disregarded the point presented. The City deems this question of prime importance to the whole nation, namely: IS THE OPERATION OF A MUNICIPALLY-OWNED AIRPORT PUBLIC UTILITY BUSINESS?

TWA in its briefs and in oral argument failed to answer this question.

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*For convenience, the parties will hereafter be referred to as "TWA" and "the City". All emphasis supplied unless otherwise noted.

The City affirmatively demonstrated that the operation of a municipal airport is a public utility business.

State v. Jackson (1929), 121 Ohio St. 186, 167 N.E. 396, stated:

> "Manifestly no argument is necessary to show that a landing field for aircraft is a public utility."

In *Jones v. Keck* (1946), 74 Ohio App. 549, 74 N.E. 2d 644, 646, the Court decided:

> "Such airports and landing fields are of the character of public utilities . . ."

In *State ex rel. City of Lincoln v. Johnson* (1928), 117 Neb. 301, 220 N.W. 273, 274, the Court determined as follows:

> "In this view of the questions raised by the auditor, an equipped municipal aviation field is both a 'public service property' and a 'public utility' within the meaning of the Home Rule Charter . . ."

To the same effect, see *Price v. Storms, et al., Board of Trustees* (1942), 191 Okla. 410, 130 P. 2d 523; *City of Toledo v. Jenkins* (1944), 143 Ohio St. 141, 54 N.E. 2d 656; *State v. Board of County Commissioners* (1947), 149 Ohio St. 583, 79 N.E. 2d 698.

In 161 A.L.R. 734 a review of the law in all jurisdictions where the question has been presented definitely hold that the operation of an airport by a municipality or other governmental agency is within the public utility field.

This Circuit Court, in *Air Transport Association v. United States* (1955), 221 F. 2d 467, held that the United States in the operation of Elmendorf Field in Alaska was engaged in "a public enterprise".

It is submitted that the crux of the instant case is to be found in a determination of whether the City in the operation of an airport is engaged in a public utility business.

The District Court stated:

> "The San Francisco Airport has been built with public funds for the public use. It is the determination of this court that this use is two-fold on one hand for the use of the air traveling public, and on the other, for the use of those individuals and corporations using the airport for their aircraft. Certainly this latter group is more restricted than the former, but this fact does not mitigate against the public utility function of the city as regards the common use facilities. These facilities are offered to the airline companies as customers of the airport; they are offered as a public utility service.
>
> "It is this court's decision that in affording the common use facilities at the airport to the airlines that the city is engaged in a public utility function."

Section 10001 of the Public Utilities Code of the State of California defines "public utilities" as it pertains to municipalities in these words:

> "'*Public utility*' defined. 'Public utility' as used in this article, means the supply of a municipal corporation alone or together with its

inhabitants, or any portion thereof, with water, lights, heat, power, *transportation of persons or property,* means of communication, *or means of promoting the public convenience."*

Section 10004 provides:

"Incidental powers included in power to acquire and operate public utility. For the purpose set forth in Sections 10002 and 10003 a municipal corporation may acquire, own, control, sell or exchange lands, easements, licenses, and rights of every nature within or without its corporate limits, *and may operate a public utility within or without the corporate limits when necessary to supply the municipality, or its inhabitants or any portion theerof, with the service desired."*

Under the doctrine of *People v. Western Airlines,* 42 Cal. 2d 622, infra, there can be no doubt that this City in the ownership of the airport is operating a public utility.

The failure of this Court to make a ruling on this vital legal point is worthy of reconsideration.

II.

THE COURT'S FAILURE TO FIND, THAT THE CITY IN THE OPERATION OF A PUBLIC UTILITY BUSINESS (AIRPORT) CANNOT DISCRIMINATE OR GIVE A PREFERENCE BETWEEN THE VARIOUS USERS OF THE COMMON USE FACILITIES AT THE AIRPORT.

The Court's refusal to sustain the judgment of the District Court will create a chaotic condition in the

aviation industry. Twelve (12) scheduled air carriers, nonscheduled carriers and private carriers use the "common use facilities" at the San Francisco International Airport. The twelve (12) scheduled carriers fly over two million passengers a year. (Tr. p. 253.) Today there are over three million passengers a year. They are in a competitive public service, using a common terminal, the San Francisco International Airport. Two of the carriers (TWA and United Air Lines) have leases with the City which set forth rates for common use facilities based on the schedules duly enacted in 1941 and 1946. (Tr. pp. 393-394.) In their contracts there is a provision that:

> "Lessor further demises and lets unto Lessee the use, in common with others authorized so to do and *on the same terms and conditions as apply to others,* of any and all general facilities, improvements, equipment and services which have been or may hereafter be provided at said San Francisco Municipal Airport . . . all of said facilities to be used and occupied in accordance with the rules and regulations of said airport." (Appellees' Brief, pp. 5-6.)

WHO ARE AUTHORIZED TO USE THE SAN FRANCISCO INTERNATIONAL AIRPORT? Section 21637, Public Utilities Code of the State of California (Stats. of 1953, Chapter 151, §1) provides:

> "In no case shall the public be deprived of its rightful equal and uniform use of the airport, or navigation facilities, or portion of either."

49 USCA, Section 1110, provides:

> "The airport to which the provision relates will be available for public use on fair and reasonable terms *and without unjust discrimination.*"

And in the enactment of the Civil Aeronautics Act of 1938, as amended, the Congress of the United States stated in the Declaration of Policy establishing the Civil Aeronautics Board, 49 USCA, Section 402:

> "In the exercise and performance of its powers and duties under this chapter, the board shall consider the following, among other things, as being in the public interest and in accordance with the public convenience and necessity.
>
> . . . . . .
>
> "(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, *without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.*"

49 USCA, Section 1101(8), defines an airport as follows:

> "Public airport means any airport which is used or to be used for public purposes, under the control of a public agency, the landing area of which is publicly owned."

49 USCA, Section 484(b), provides:

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person,

port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation *to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.*"

Ten of the scheduled air carriers, and all non-scheduled and private carriers using the San Francisco International Airport pay according to the schedule of rates and charges for the use of the common facilities as promulgated admittedly according to law by the Public Utilities Commission of the City.

The decision of this Court would effectuate a variation of all principles of utility law by permitting City to contract with two air carriers (TWA and United) on a preference basis and to regulate the remaining ten scheduled carriers, non-scheduled and private carriers for the use of the same "common use facilities".

All twelve of the scheduled air carriers using the airport are in interstate or foreign air commerce within the meaning of the Civil Aeronautics Act of 1938, as amended. (49 USCA, Section 401 (20).)

The regulation of rates and charges for "common use facilities" at the airport must of necessity be non-discriminatory. The Supreme Court has uniformly held that there can be no discrimination or discriminatory practices or preferences indulged in by carriers in interstate commerce, whether by rail, shipping, or otherwise. In *Baltimore & O. R. Co. v.*

United States (1939), 305 U.S. 507, it was held that where interstate carrier warehouse rates were not open to all shippers alike there was a violation of the Interstate Commerce Act.

In *United States v. Baltimore & O. R. Co.* (1948), 333 U.S. 169, the Supreme Court had this to say:

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first act, and all amendments to it, have aimed at wiping out discriminations of all types. New York v. United States, 331 U. S. 284, 296, 91 L. ed. 1492 on 1507, 67 S. Ct. 1207.
>
> "It would be strange if this legislation left a way open whereby carriers could engage in discrimination merely by entering into contracts for the use of trackage. In fact this court has long recognized that the purpose of Congress to prevent certain discriminations and prejudicial practices could not be frustrated by contracts even though the contracts were executed before enactment of the legislation."

The following case is analogous to the situation at bar namely, *Union Pacific Railroad Co. v. United States* (1941), 313 U.S. 450. Kansas City, Kansas, aided by the railroad company, gave cash bonuses and rental credits to induce dealers to become tenants of a new wholesale produce terminal. The dealers were former tenants of the terminal owned by Kansas City, Missouri. The standard rental adopted was $150 per month per unit, but for the first three months after official completion date of terminal only $50 a month

was charged. The Supreme Court of Kansas in the case of *Kansas and State ex rel. Parker v. Kansas City,* 151 Kan. 1, 97 P. 2d 104, held the city had authority to pay sums to induce new tenants for the new terminal. The city was enjoined from such practices. The Court stated:

> "In fact favoritism which destroys equality between shippers, however brought about, is not tolerated.
>
> "In our view, action by any person to bring about discriminations in respect to transportation of property is rendered unlawful by the Elkins Act. Any other conclusion would do violence to a dominant purpose of carrier legislation.
>
> "Where, as here, the action of the city in giving cash or rental credits is, as we have decided, a part of the plan in respect to transportation resulting in an advantage to shippers, we conclude that the giving of any cash, rental, credit, free or reduced rents to induce leasing of space in the terminal is contrary to the Elkins Act."

In *California v. United States,* 320 U.S. 577, the State of California and the City of Oakland were enjoined from giving preferential demurrage charges on the wharfs in San Francisco and in the City of Oakland. The Maritime Commission fixed a schedule of maximum free time and another schedule for avoiding discrimination to noncompensatory charges.

This Court in its decision permits the City the privilege of having twelve separate rates or charges for the common use facilities at the airport. In so doing, it does violence to all concepts of utility law

that forbids preferences or discrimination in charges for public utility services.

III.

THE COURT'S MISINTERPRETATION OF THE LAW, THAT IN THE OPERATION OF THE AIRPORT, IT IS A STATE OR FEDERAL AFFAIR, RATHER THAN A "MUNICIPAL AFFAIR" CONTROLLED AND GOVERNED BY THE PROVISIONS OF THE CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO.

The Court on page 5 of its opinion stated:

> "The airport is not strictly a local affair. It is part of a global system of air transportation. Its value stems from the fact that it links the San Francisco area with other areas served by airports. It distinctly serves not only the city of San Francisco but all neighboring and outlying communities. The airport is used as a military airport. Federal and state authorities regulate charges for common carrier air traffic."

Under the provisions of Article XI, §19 of the State Constitution adopted in 1911 an airport is a "municipal affair". The first sentence of §19 of Article XI provides:

> "Any municipal corporation may *establish and operate* public works for supplying its inhabitants with light, water, power, heat, *transportation,* telephone service *or other means of communication.*"

An airport is a public work for supplying inhabitants of the municipality with transportation under the constitutional provision. This is made clear by the

interpretation of the State Supreme Court of the provisions of Section 20 of Article XII of the Constitution relative to the powers of the State Public Utilities Commission, also adopted in 1911, in *People v. Western Airlines,* 42 C. 2d 622.

In *People v. Western Airlines,* Western challenged the jurisdiction of the State Public Utilities Commission to establish intrastate rates for airline passengers.

One ground of objection was that Article XII, §20 of the Constitution which conferred upon the Commission power over the rates of "transportation companies" did not include airlines companies. The Court, at page 635 stated as follows:

> "The fact that airline transportation companies were not in existence when the Constitution was adopted in 1879 does not make them any the less 'transportation companies' within the meaning and contemplation of article XII. It was well said by the Supreme Court of Nebraska in *State ex rel. State Railway Com. v. Ramsey* (1949), 151 Neb. 333, at page 338 (37 N.W.2d 502): '. . . A constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable. *Pensacola Telegraph Co. v. Western Union Telegraph Co.,* 96 U.S. 1, 24 L.Ed. 708; 11 Am.Jur., Constitutional law § 51, p. 660; 9

> Am.Jur., Carriers, § 4, p. 430. These principles have been held to be applicable to transportation by air. "Transportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result." *Curtiss-Wright Flying Service v. Glose,* 66 F.2d 710, certiorari denied 290 U.S. 696 (54 S.Ct. 132, 78 L.Ed. 599, . . . (citations omitted).' "

Therefore, under Article XI, §19, San Francisco was given the direct constitutional grant to establish and *"operate"* an airport.

The City owns its own water system, which serves San Francisco, parts of Alameda County and most of the Peninsula area. This water system links San Francisco with other areas and serves neighboring and outlying communities. That the State of California is greatly concerned with water is evidenced by a separate water code which legislates for over fifty water agencies. The use and control of water is more of a statewide affair than airports.

However, municipally owned water systems are municipal affairs under the jurisdiction of the municipality, *and not subject to State regulation.*

See:

City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 Pac. 25;

Jochimsen v. Los Angeles, 54 C.A. 715, 202 Pac. 902.

If municipally owned water, light, heat and power systems are "municipal affairs", it necessarily follows that a municipally owned airport is a "municipal affair".

On the other hand all *private* public utility water systems are under the jurisdiction of the Public Utilities Commission of the State. In fact all private public utilities are subject to the jurisdiction of the State Public Utilities Commission.

The State Supreme Court long ago ruled that municipally owned utilities were not under the jurisdiction of the State. This was amply pointed out to the Court in *Durant v. City of Beverly Hills* (1940), 39 C.A. 2d 133, 137, 102 P. 2d 759:

> "The power of the city to fix rates to be charged those customers residing within its boundaries is incidental to the power to 'establish and operate' public utility systems conferred by section 19 of article XI of the Constitution. This power to fix the charges for service by the municipality when operating a municipally owned public utility is not controlled by section 23 of article XII of the Constitution. (City of Pasadena v. Railroad Com., 183 Cal. 526, 534 [192 Pac. 25, 10 A.L.R. 1425]; Jochimsen v. Los Angeles, 54 Cal. App. 715, 716 [202 Pac. 902].) The power of the city to furnish services to inhabitants outside its boundaries is a part of the constitutional grant found in section 19 of article XI, wherein the city is authorized to establish and operate the utility; and since the operation of the system in the outside territory is but incidental to the main purpose of service to the in-

habitants of the city, it follows as of course that the municipal authorities enjoy the same right to fix the charges to be paid by those served in the outside territory as it has to fix those charged its own inhabitants."

In *Polk v. City of Los Angeles* (1945), 26 Cal. 2d 519, 539, 150 Pac. 2d 931, our Supreme Court states:

"The present Railroad Commission was created by an amendment to the Constitution on October 10, 1911 (Cal. Const., Art. XII §22). Thereafter it was held that the powers conferred on the commission did not extend to the regulation of utilities operated by municipalities; that its power of regulation was limited to privately operated public utilities; and that the Legislature could not extend that power to embrace municipally operated utilities."

See also *City of Pasadena v. Railroad Com.* (1920), 183 Cal. 526, 192 P. 2d; *Bowles v. City and County of San Francisco* (1946), 64 Fed. Supp. 609; *Jochimsen v. City of Los Angeles* (1921), 54 C.A. 715, 202 P. 902.

A public utility owned and operated by a municipality can only forsake its own jurisdiction over its public utilities through an election as provided for by the provisions of the Public Utilities Code of the State of California. See: Sections 2901, 2904, 2906 and 2931.

The City cited both *Krenwinkle v. City of Los Angeles* (1935), 4 Cal. 2d 611, and *Ebrite v. Crawford* (1932), 215 Cal. 724, to show that the California

Supreme Court regarded the operation of an airport as a "municipal affair". The Court misconstrued the purpose of the citations and stated:

> "These cases support the view that the conduct of a municipal airport is a matter subject to State law."

San Francisco acquired its airport in 1926 prior to the amendment of the Municipal and County Airport Law (Cal. Stats. 1927, p. 458). The airport was not acquired under the State Airport Act as in the *Krenwinkle* and *Ebrite* cases, supra, as these cities acquired their airports under 1927 statute. The City's airport came into being under the provisions of California Statutes of 1911, Chapter 715, and Article XII of the Charter of 1900, as amended, it was acquired as a public utility just as the City acquired the Spring Valley Water System.

The fact that the Municipal and County Airport Law refers to "any such city and county" (San Francisco being the only one in the State) is of no significance, since the airport was already established by the City. It is common knowledge, that in the enactment of laws in this State, the Legislature always uses the expressions "city and county", "city", or "county". The enactment of general legislation pertaining to local governmental bodies must of necessity embrace all units of the State.

Of main importance to the issue at bar and completely overlooked by the Court was the ratification of the new Charter of the City and County of San Francisco in 1932 by the State Legislature.

The District Court pointed out that "the approved charter of a municipality is a law of the state and has the same force and effect as a law enacted by the Legislature." (Citing *Yosemite Etc. v. State Board of Equalization* (1943), 59 Cal. App. 2d 39.)

The City agrees that when the contract was entered into in 1942 with TWA it was a valid contract. That contract, however, embodied every provision of rates and charges for common use facilities at the airport under the legal schedule adopted in 1941 by the City, under its Charter powers. The City at the time of the contract was controlled by its Charter of 1932 and not the general Municipal and County Airport Law of 1927, which applied to cities and counties that had not legislated on the same subject matter.

Home Telephone Co. v. Los Angeles, 211 U.S. 274, emphasizes that a city must have express power through its charter to contract as to rates. No such power is given to the City through its Charter.

The interpretation of what can and cannot be done by authorities operating airports, especially "common use facilities" is ably expressed by the Court in *Hillsborough County Aviation Authority v. National Airlines* (1953), 60 So. 2d 61, 48 ALR 2d 1056.

The contract of 1942 was valid when entered into because the rates and charges set forth in the contract were the valid rates for the "common use facilities". Those rates applied to all air carriers not to TWA—alone. If the rates set forth in the contract *were special rates* and not subject to further regulation by the City, as a matter of law, the contract was *ultra*

vires, for the City is not empowered to divest itself of its police power.

Sections 121, 122, 125 and 130 of the Charter are the controlling laws as far as San Francisco is concerned in its operation of the airport.

WHAT DO THESE SECTIONS SAY? They make of the airport a public utility under jurisdiction of the Commission of the City. Section 130 of the Charter makes it mandatory for the Public Utilities Commission to establish rates and charges for furnishing of service by any utility under its jurisdiction. The airport is clearly recognized as a public utility under the Charter (a municipal affair), and by the State of California because the Legislature approved the Charter in 1932.

IV.

IF THE OPERATION OF THE AIRPORT IS NOT A MUNICIPAL AFFAIR, IT MUST BE A FEDERAL AFFAIR CONTROLLED BY THE CIVIL AERONAUTICS ACT OF 1938, AS AMENDED, THEN THIS COURT IS WITHOUT JURISDICTION.

Assuming without admitting, that the Court is correct, that the City can enter into a contract giving a preference of rates and charges for the common use facilities at the airport, the City submits that such a contract must first be approved by the Civil Aeronautics Board, since it would be a "federal affair".

The evidence is uncontradicted that the contract in question gives to TWA lower rates for the common

use facilities than those charged to ten other air carriers using the same common use facilities.

In *S.S.W., Inc. v. Air Transport Ass'n of America* (1951), 191 Fed. 2d 659, where it was complained that American Airlines, TWA, Braniff Airlines, Colonial Airlines, Eastern Airlines, Capital Airlines, Northwest Airlines, Pan American Airlines and United Airlines had entered into an agreement which violated the anti-trust laws. The Court ruled that recourse must first be sought through the Civil Aeronautics Board, and remanded the case to the District Court until the Civil Aeronautics Board had determined if the contract in question was violative of the provisions of the Civil Aeronautics Act of 1938, as amended.

The Court stated:

> "The aircraft industry, like railroads and power, is one in which Congress has decided that the public interest is best served, not by free competition, but rather by direct and uniform regulation by an 'agency authorized to supervise almost every phase of the regulated company's business.'"

The Court further states (p. 662):

> "It provides that 'Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of *every contract or agreement* (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other

air carrier, foreign air carrier, or other carrier *for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.'"*

In the case at bar there is no showing that TWA had its contract approved by the Civil Aeronautics Board by which it claims it is entitled to a preference in rates for the common use facilities as against the other air carriers using the same facilities under rates and charges legally promulgated by the Public Utilities Commission of the City.

The Civil Aeronautics Act provides for detailed and comprehensive economic regulation by the Board. It has control of certificates of public convenience and necessity (49 USCA, Section 481); supervision of rates and services (49 USCA, Section 484); authority over mail rates (49 USCA, Section 486); loans and financial aid from United States agencies (49 USCA, Section 490).

Further, the Board is empowered to initiate or hear complaints of "unfair or deceptive practices or unfair methods of competition in air transportation," and to issue cease and desist orders against such practices or methods of competition (49 USCA, Section 491).

The Board also has control of pooling or other agreements and the right to approve or disapprove such agreements (49 USCA, Section 492).

49 USCA, Section 1110 provides:

> "As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that—(1) the airport to which the project relates will be available for public use on fair and reasonable terms and *without unjust discrimination.*"

In *S.S.W., Inc. v. Air Transport Ass'n of America,* supra, the Circuit Court remanded the case to the District Court, as being consistent with *General American Tank Car Corp. v. El Dorado Terminal Co.* (1940), 308 U.S. 422, 433; 60 S.Ct. 325, 331; 84 L. Ed. 361, in which the Supreme Court said:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal but * * * the cause should be held pending the conclusion of an appropriate administrative proceeding."

There is presently before the Civil Aeronautics Board in Docket No. 7324, a case analogous to the instant matter. The case pertains to Miami International Airport regarding leases which provide for schedules of landing charges on a sliding scale decreasing the rates to the tenant as airport use by the

tenant increased. Irregular domestic carriers and foreign carriers filed a complaint against the lessees and Dade County Port Authority charging violation of Sections 404 (b), 411, 1102 and 205 of the Civil Aeronautics Act. Acting Chief Counsel for the Office of Compliance ruled that the Board did not have jurisdiction. However, the complainants have filed an appeal from the ruling asking the Board to reverse the ruling, or, in the alternative, to launch an investigation. The matter is still pending.

If the Civil Aeronautics Board is a regulatory body empowered to administer the Act, such as the Interstate Commerce Commission and the Maritime Commission, jurisdiction should be accepted in Docket No. 7324.

Likewise, the TWA contract giving it preference over other air carriers using the common use facilities at the San Francisco International Airport should be approved by the Civil Aeronautics Board before this Court takes jurisdiction of the matter.

If the judgment in *S.S.W., Inc. v. Air Transport Ass'n of America,* supra, is followed by this Court, this matter should be remanded to the District Court until such time as the ruling is made by the Civil Aeronautics Board, upon the right of the City to enter into a contract giving preference rates to TWA and regulating the rates for the same facilities for ten other scheduled air carriers.

We submit that if the matter before this Court is a "federal affair" the primary jurisdiction rests in the Civil Aeronautics Board.

V.

IF THE OPERATION OF THE AIRPORT IS NEITHER A MUNICIPAL NOR FEDERAL AFFAIR, IT MUST BE A STATE AFFAIR CONTROLLED BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THEN THIS COURT IS WITHOUT JURISDICTION.

Regulatory power must rest in some governmental body if discrimination in the use of facilities common to all air carriers is to be avoided. The City insists that under Section 130 of the Charter it is empowered to regulate the rates and charges for the common use facilities at the airport.

This Court, in reviewing the *Krenwinkle* and *Ebrite* cases, supra, states:

> "These cases support the fact that the conduct of municipal airports is a matter subject to state law."

Assuming, without admitting, that the operation of an airport by a municipality is a "state affair", the contract in question as to the common use facilities would be *ultra vires,* since it gives preference to TWA.

Section 453 of the Public Utilities Code of the State of California provides:

> "§453. *Preferential rates prohibited.* No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or

in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section."

Section 728 provides:

"§728. *When fixing of rates by commission required.* Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules practices or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix by order, the just, reasonable, or sufficient rates, classifications, rules, practices or contracts to be thereafter observed and in force."

Section 729 provides:

"§729. *Commission's authority upon hearing.* The commission may upon a hearing, investigate a single rate, classification, rule, contract, or practice, or any number thereof or the entire schedule or schedules of rates, classifications, rules, contracts, and practices, or any thereof, of any public utility and may establish new rates, classifications, rules, contracts, or practices or schedule or schedules in lieu thereof."

Even if the State owned or *controlled* the airport, the contract in the instant case would be void. Section 21637 of the California Public Utilities Code provides:

"§21637. *Contracts, etc., for operation of airports, etc.* In operating an airport or air navigation facility owned or controlled by the State, the commission may enter into contracts, leases, and other arrangements for a term not exceeding 20 years with any person, granting the privilege of using or improving the airport or air navigation facility or space therein for commercial purposes, conferring the privilege of supplying goods, commodities, things, services, or facilities at the airport or air navigation facility, or making available services to be furnished by the commission or its agents at the airport or air navigation facility. In each case the commission may establish the terms and conditions and fix the charges, rentals, or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with regard to the property and improvement used and the expenses of operation to the State. In no case shall the public be deprived of its rightful, equal, and uniform use of the airport, air navigation facility, or portion of either. The commission shall grant no exclusive privilege for the sale or delivery of gasoline or other petroleum products."

If the regulation of rates and charges of common use facilities that TWA complains is in violation of the contract of 1942 and the question is a "state affair", according to the decision of this Court, then Section 1702 of the California Public Utilities Code provides TWA its remedy. Section 1702 holds:

"Who may make complaint: When complaint may be made. Complaint may be made by the

commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done *by any public utility,* including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water or telephone service."

CONCLUSION.

Rehearing should be granted in the instant case because the Court has failed to decide vital issues affecting a great nationwide industry. Every municipality throughout the United States owning and operating an airport will be affected by the decision of this Court.

The appellees and cities, counties and states throughout the nation desire a judicial determination of these questions regarding their airports:

1. Are airports public utilities?

2. Can municipalities, as owners and operators of an airport give preferential rates to some air carriers by contract and regulate other carriers in the same classification?

3. Is the ownership and operation of an airport by a municipality a "municipal affair", "federal affair", or "state affair", and subject to regulation according to the charter of the municipality or the laws of the state, or the Civil Aeronautics Act of 1938, as amended?

We submit for the foregoing reasons that rehearing should be granted in this matter.

Dated, San Francisco, California,
January 16, 1956.

Respectfully submitted,

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Attorneys for Appellees and Petitioners.

Certificate of Counsel

I hereby certify that I am City Attorney of the City and County of San Francisco and one of the counsel for appellees and petitioners in the above-entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 16, 1956.

Dion R. Holm,
City Attorney of the City and County of San Francisco,
Counsel for Appellees
and Petitioners.